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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/715,871	11/17/2003	John M. Epley	103419-0003	5600
35940	7590	06/05/2009		
ATER WYNNE LLP 1331 NW Lovejoy St. Suite 900 PORTLAND, OR 97209-2785			EXAMINER HOEKSTRA, JEFFREY GERDEN	
			ART UNIT 3736	PAPER NUMBER
			MAIL DATE 06/05/2009	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/715,871

Applicant(s)

EPLEY, JOHN M.

Examiner

Jeffrey G. Hoekstra

Art Unit

3736

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 26 May 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-8 and 20-25.
Claim(s) withdrawn from consideration: 9-19.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Max Hindenburg/
Supervisory Patent Examiner, Art Unit 3736

/Jeffrey G Hoekstra/
Examiner, Art Unit 3736

Continuation of 11. does NOT place the application in condition for allowance because:

The amendments will be entered as they are directed to formal issues not affecting the scope of the invention and the claims would be rejected commensurate with the Final rejection set forth in the Office Action mailed 03/27/2009. The objections to claims 2 and 8 are withdrawn in view of the amendments.

Initially in response to Applicant's assertions that claims 23-25 were not expressly rejected in the Final Office Action mailed 03/27/2009, the Examiner notes claims 23-25 were expressly rejected as set forth in paragraphs 12-14. However the Examiner does apologize any confusion to Applicant and notes paragraph 4 contained a typographical error omitting claims 23-25. Paragraph 4 should read "Claims 1, 2, 7, 8, 20, 21, 22, and 23-25 are rejected under 35 U.S.C. 102(b) as being anticipated by Galiana et al. (US 5,942,954, hereinafter Galiana)".

In addition the Examiner notes the Office Action mailed 03/27/09 rejected the new scope of invention positively recited in the claim amendments filed 12/23/08. With respect to Applicant's assertions that the rejection is based on a contradiction of the previous rejection of the claims, the Examiner reiterates the rejection was based on Densert in view of Galiana in view of Gallery with respect to the amended claims addressed in the Office Action mailed 07/02/09.

Applicant's request for reconsideration has been considered, does not place the application in condition for allowance, and in response the Examiner notes the following:

Applicant argues the anticipatory rejection of at least claims 1, 7, and 20, specifically arguing Galiana does not expressly or inherently anticipate the claims because Galiana does not disclose, teach, and/or fairly suggest either an "eye-enclosing portion" or that the eye-enclosing portion is "likewise positionally stable" relative to the subject's head.

The Examiner disagrees, maintains the rejection as set forth and cited in the Office Action mailed 03/27/09, and in response notes the following:

Galiana, as admitted by Applicant, discloses a heads up display (HUD). Contrary to Applicant's apparent assertions, Galiana's HUD is disclosed as a portion of "a portable apparatus for analyzing visual and vestibular responses of a subject" (column 3 lines 11-12) that visually stimulates the subject (column 4 lines 21-24). The visual stimulation occurs with the HUD when the subject wears the portable apparatus (shown schematically in Figure 1). The subject is free to move their head in response to the stimuli because the apparatus and its components are "adapted for wearing on a subject's head in a condition of positional stability relative thereto" (i.e. the apparatus is configured to fit snugly on and/or secured to the subject's head so it does not fall off during stimulation, either visually or more likely with imparted motion). While the apparatus comprising in part the HUD is positionally-stably worn on a subject's head, the HUD visually stimulates the subject using "dual chromic display panels being individually controlled for each eye, with up to [plus/minus] 40-degree retinal deviations". The "eye-enclosing portion" is at least a portion of the HUD's display panels. A panel is a physical structure that is not necessarily transparent (e.g. such as a windshield) as asserted by Applicant. In order for the subject to be visually stimulated, Galiana is expressly concerned with configuring the display panels such that they "substantially obstruct the subject's normal visual range" by configuring the deviation they are oriented from the retina in order for the stimulation which obstructs the subject's normal visual range to occur.